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No. .....

In the Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,
Appellee,

vs.

IRA K. WITSCHNER,
Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether in a criminal trial, the trial court's refusal to acquire information through petitioner's offer of proof, which would have enabled it to make an accurate assessment of the admissibility of character evidence prior to petitioner's taking the stand, constituted an abuse of discretion or a denial of due process?

II. Whether, in a criminal trial, the trial court's refusal to allow cross-examination of a government witness with regard to bias arising from his father's status as a federal probationer, when the witness' testimony varied from previous statements in a manner favorable to the government, was a denial of the rights of confrontation and assistance of counsel?

TABLE OF CONTENTS

Questions Presented 1
Opinions Below 1
Statement of Jurisdiction 1
Constitutional Provisions and Rules Involved 2
Statement of the Case 4
Reasons for Granting the Writ—
I. The Trial Judge's Refusal to Hear Petitioner's Offer of Proof Constituted an Abuse of Discretion and a Denial of Due Process 6
1. The Trial Judge's Refusal to Hear an Offer of Proof Enabling it to Rule on the Admissibility of Character Evidence Prior to Petitioner's Taking the Stand Constituted and Abuse of Discretion in Light of the Policies Embodied in the Federal Rules of Evidence 6
2. A Trial Judge's Refusal to Adopt a Procedure Enabling It to Rule on the Admissibility of Character Evidence Prior to Petitioner's Taking the Stand Constitutes a Denial of Due Process 11
II. The Trial Court's Refusal to Allow Cross-Examination of the Government Witness With Regard to Bias Arising Out of His Father's Status As a Federal Probationer, When the Witness' Testimony Varied From His Previous Statements in a Manner Favorable to the Government, Denied the Defendant the Right to Confront the Witness and the Right to Effective Assistance of Counsel 13
Conclusion 15

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Appendix—

Opinion of the Eighth Circuit A1
Order of the Court of Appeals A12
Order of the Eighth Circuit A13

TABLE OF AUTHORITIES

CASES

Coffin v. United States, 156 U.S. 432 (1895) 12
Davis v. Alaska, 343 U.S. 308 (1974) 14
In re Winship, 397 U.S. 358 (1970) 12
Kastigar v. United States, 406 U.S. 441 (1972) 12
McGautha v. California, 402 U.S. 183 (1971) 11
Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 12
Namet v. United States, 373 U.S. 179 (1963) 13
Patterson v. McCarthy, 581 F.2d 220 (9th Cir. 1978) 14
Spencer v. Texas, 382 U.S. 554 (1967) 11
United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978) 8
United States v. Clemons, 503 F.2d 486 (8th Cir. 1974) 8
United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), *cert. denied*, 444 U.S. 1034 (en banc 1980) 10
United States v. Goehring, 585 F.2d 371 (8th Cir. 1979) 8
United States v. Harris, 542 F.2d 1283 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977) 9, 14
United States v. Havens, ... U.S. ....., 100 S.Ct. 1912 (1980) 9
United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975) 10
United States v. O'Connor, 580 F.2d 38 (2d Cir. 1978) 9

United States v. Pantone, 609 F.2d 675 (3rd Cir. 1979) 8, 9
United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) 14
United States v. Perry, 512 F.2d 805 (6th Cir. 1975) 13
United States v. Qualls, 500 F.2d 1238 (8th Cir. 1974), *cert. denied*, 419 U.S. 1051 (1974) 14

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution—
Amendment V 2, 12
Amendment VI 2, 12
18 U.S.C. Sec. 371 4
18 U.S.C. Sec. 1341 4
28 U.S.C. Sec. 1254(1) 1
Federal Rules of Evidence—
Rule 102 10
Rule 403 ..... 2, 7, 9
Rule 404 ..... 2, 6, 7, 8, 9
Rule 608(b) 3, 9
Rule 609 7
Rule 611(b) 9

OTHER

120 Cong. Rec. Pt. II at 2376-2377 (Feb. 6, 1974) 7

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OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction in an opinion filed July 3, 1980. Petitioner's Motion for Rehearing was denied by the United States Court of Appeals on July 29, 1980. Both the Opinion and the Judgment of the Court as well as the Order denying rehearing are attached in Appendix.

STATEMENT OF JURISDICTION

The appeal was denied Petitioner by the United States Court of Appeals for the Eighth Circuit on July 3, 1980. Rehearing was denied on July 29, 1980.

The United States Supreme Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

3. Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

4. Rule 404 of the Federal Rules of Evidence provides in pertinent part:

> (a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: . . .
>
> (3) Character of witness.—Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

5. Rule 608(b) of the Federal Rules of Evidence provides:

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

STATEMENT OF THE CASE

Petitioner, Ira Keith Witschner, is an attorney who was convicted of seven (7) counts of mailing fraudulent medical reports under 18 U.S.C. Sec. 1341 and a single count of conspiracy to commit mail fraud in violation of 18 U.S.C. Sec. 371.

According to the Government's theory of the case, during the pendency of the scheme from June, 1975 until November, 1976, the petitioner referred clients who had suffered personal injuries in automobile accidents to a Dr. Smith, who prepared medical reports for transmittal to insurance companies which were generally accurate as to diagnosis but inflated as to the number of visits for treatment and actual medical charges. Because of various stipulations and concessions, the only controverted issue was whether petitioner had knowledge of Dr. Smith's fraudulent reports (TR IV 47, 50). Petitioner was linked to the scheme by the testimony of Dr. Smith, an immunized witness, and his secretary, Barbara Savage, who admitting preparing the false reports and corroborating documents, but who was never prosecuted.

An additional witness at trial was an Albert Bossert, a former client of petitioner, and the only client who testified that the petitioner had instructed him to lie about the number of times he visited Dr. Smith or who, in any way, indicated the petitioner knew of the falseness of the representations contained in Smith's reports. Although Bossert had earlier given a statement to the Federal Postal Inspector, that statement had indicated that he had gone to the doctor at least ten times and never mentioned any knowledge to the contrary by the petitioner. Bossert at trial testified that he had gone only three times and that the petitioner not only knew

of that fact, but instructed him to lie if the question arose in the future. Petitioner's attorneys sought to impeach the credibility of the witness by demonstrating his motive to falsify in that both his father and his uncle were on federal probation and that he felt he might be in a position to help them or harm them by his testimony.

The Prosecuting Attorney indicated that the witness' attorney had discussed with him the fact of the witness' relatives' status when he was served with the subpoena, but nonetheless, petitioner's attorneys were not allowed to question the witness concerning possible bias before the jury.

After the prosecution had rested and two defense experts had testified, the petitioner renewed his motion in limine filed on the first day of trial, which sought a ruling as to whether the Government could use character evidence either on cross-examination or on rebuttal if he took the stand. The evidence in question related to a Dr. Caruso to whom petitioner had also referred clients. The evidence in question would apparently show that clients of petitioner had gone to Dr. Caruso less times for treatment than indicated on medical reports signed by Dr. Caruso (TR III 249). There was no indication in the record below that Dr. Caruso, or anyone in his office, or any of the client-patients, would testify on the issue of petitioner's complicity in the scheme (TR III 248).

Petitioner indicated that a ruling by the court was essential to his decision to take the stand. He offered to submit to direct and cross-examination out of the hearing of the jury so that the court would be able to determine admissibility (TR III 254). Although the court initially assented to this procedure, it then declined to proceed, even though petitioner agreed that if his testi-

mony were to change before the jury, the court would not be bound by a conditional ruling as to the inadmissibility of the evidence (TR III 253). The petitioner then refused to take the stand and both sides rested.

REASONS FOR GRANTING THE WRIT

This case presents important issues on the obligation of the trial court to conduct a trial so as to effectuate the policies with regard to bad character and conduct evidence expressed in the Federal Rules of Evidence, and to ensure a fair trial. The holding of the Court of Appeals denies a criminal defendant the protection afforded both by the Rules of Evidence and the Constitution, and in so doing undermines the truth-serving process of the criminal trial by chilling the defendant's opportunity to testify in his own behalf.

I. The Trial Judge's Refusal to Hear Petitioner's Offer of Proof Constituted an Abuse of Discretion and a Denial of Due Process

1. The Trial Judge's Refusal to Hear an Offer of Proof Enabling it to Rule on the Admissibility of Character Evidence Prior to Petitioner's Taking the Stand Constituted an Abuse of Discretion in Light of the Policies Embodied in the Federal Rules of Evidence

The Federal Rules of Evidence demonstrate Congress' concern that apprising the jury of a criminal defendant's bad character or conduct will unfairly prejudice him because the jury may convict when unsure of guilt on the theory that the defendant is a bad man deserving of punishment. Although Rule 404(b) recognizes that evidence of a defendant's bad acts or character "may . . . be admissible" as substantive evidence when relevant to some

proposition other than defendant's propensity to commit the charged crime, exclusion is nevertheless mandated subject to Rule 403 "when the danger of undue prejudice outweighs the probative value of the evidence" (Advisory Committee Note To Rule 404) because of the continuing risk that jurors will misuse the evidence to find the defendant worthy of punishment.

Congress' concern with minimizing prejudice is also apparent in its treatment of impeachment in Rules 608 and 609. The debate on these rules amply demonstrates Congress' awareness of three interrelated factors which operate when a would-be witness is also the accused: 1) a defendant will not take the stand when he fears that evidence of bad character offered in the guise of attacking credibility will instead be misused by the jurors to convict via the forbidden propensity inference which triggers the desire to punish, 2) a defendant's testimony is often crucial to an effective defense, 3) unless defendant takes the stand jurors will tend to infer guilt despite defendant's constitutional right not to present a defense and not to have an adverse inference drawn from his failure to testify. 120 Cong. Rec. Pt. II at 2376-2377 (Feb. 6, 1974) (statements of Representatives Dennis and Wiggins).

In order to make more meaningful the accused's constitutional right to take the stand in his own behalf, Congress reworked the rules on impeachment by bad acts and convictions to be considerably more restrictive than the rules previously applied in the Federal courts, and except for a limited class of convictions automatically usable against a defendant, made all such impeachment subject to a Rule 403 balancing test.

Given this clear expression of legislative intent to prevent convictions based on character rather than on proven

guilt, and to encourage testimony by the accused, the trial judge's refusal to allow petitioner to make an offer of proof of his proposed testimony constituted an abuse of discretion. The posture of the evidence was such, at the conclusion of the Government's case-in-chief and after the petitioner's experts had testified, that the trial judge should have realized that unless petitioner "opened the door" to other crimes evidence by his direct testimony (see, *e.g.*, *United States v. Pantone,* 609 F.2d 675 (3rd Cir. 1979); *United States v. Benedetto,* 571 F.2d 1246 (2d Cir. 1978), rebuttal evidence and questions on cross-examination about the Caruso claims would be barred.

Initially, the Caruso evidence would violate the Eighth Circuit rule requiring "clear and convincing" evidence that "defendant committed the other crime." *United States v. Goehring,* 585 F.2d 371, 373 (8th Cir. 1979); *United States v. Clemons,* 503 F.2d 486, 489 (8th Cir. 1974). More importantly, in order for the inflated Caruso reports to have any relevance to petitioner's intent, the only contested issue in the case, the jury would have to draw the inference prohibited by Congress in Rule 404. It would have to conclude that because there was some testimony regarding petitioner's knowledge of the charged Dr. Smith scheme that this meant that petitioner had a propensity to get involved in insurance schemes with doctors, and that he, therefore, did in fact have knowledge of the Caruso scheme, and this in turn made it more likely that the witnesses were telling the truth when they said that petitioner knew about Smith. Given petitioner's experts' uncontroverted testimony that it was not the custom of personal injury attorneys to check the details of a doctor's report prior to preparing for trial (TR IV 199-230), the false Caruso reports in themselves are not indicative of any intent unless a propensity inference is drawn. Nor, in the absence of testimony by petitioner on direct, would there

be any basis for concluding that the Caruso claims constituted part of a common plan or scheme. See, *e.g.*, *United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978).

In the absence of connecting testimony on direct, cross-examination as to whether petitioner knew that Dr. Caruso was submitting false claims with regard to clients referred by petitioner would violate the command of Rule 611(b) that "cross-examination should be limited to the direct examination and matters affecting the credibility of the witness." See *United States v. Pantone*, 609 F.2d 675, 682 (3rd Cir. 1979) ("the government may not cross-examine on collateral matters not testified to on direct in order to establish a ground for the admission of otherwise inadmissible evidence."). See also *United States v. Havens*, ... U.S. ....., ..., 100 S.Ct. 1912, 1916 (1980).

In the absence of connecting testimony on direct, impeachment pursuant to Rule 608 would also be barred since it is "improper conduct for the government to ask a question which implied a factual judicate which the examiner knows he cannot support by evidence." *United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977). Furthermore, questions about the Caruso claims if relevant solely to petitioner's credibility would require exclusion pursuant to the last sentence of Rule 608 which provides that testifying "does not operate as a waiver of [defendant's] privilege against self-incrimination when examined with respect to matters which relate only to credibility."

If the tendered offer of proof had been allowed and had demonstrated that the Caruso evidence could not satisfy Rules 404, 608, 611 and 403, a ruling excluding the evidence could have been conditioned—as suggested by petitioner—on petitioner's testimony before the jury

conforming to the offer of proof. Such a procedure has been approved in the analogous situation where defendant seeks a ruling precluding use of his prior convictions if he had taken the stand. See, *e.g.*, *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980) (en banc) (approving an offer of proof); *United States v. Jackson*, 405 F. Supp. 938, 942 (E.D.N.Y. 1975) (holding that "in order fully to effectuate the policy of encouraging defendants to testify, trial courts should rule on the admissibility of prior crimes to impeach as soon as possible after the issue has been raised.").

Such a procedure should have been employed because it should have been apparent to the trial judge that the need for petitioner's testimony was particularly compelling. Jurors are undoubtedly even more likely to infer guilt when an attorney fails to testify, than in the case of the ordinary defendant about whom Congress expressed concern. Since the only controverted issue was petitioner's state of mind, his testimony was crucial to an effective defense. Only he could have denied the incriminating conversations testified to by the prosecution witnesses and explained the procedures in his office. The possibility of making an accurate determination would have been greatly enhanced had the jurors had the benefit of petitioner's explanation and the opportunity to assess his demeanor, particularly since the only testimony about petitioner's knowledge came from witnesses whose credibility was highly suspect. According to Rule 102 of the Federal Rules of Evidence, the objective of the law of evidence is "that the truth may be ascertained and proceedings justly determined."

The trial judge abused his discretion in not permitting a record to be made on the basis of which there could have been an accurate assessment of the admissibility of

the uncharged Caruso acts. In light of the policy concerns expressed by Congress in the Federal Rules of Evidence, petitioner should not have had to bear the risk of taking the stand and arguing error on appeal if the Caruso claims reached the jury.

2. A Trial Judge's Refusal to Adopt a Procedure Enabling It to Rule on the Admissibility of Character Evidence Prior to Petitioner's Taking the Stand Constitutes a Denial of Due Process

Although the use of other crimes evidence against a defendant who chooses to testify in his own behalf has not been found to constitute an impermissible burden upon his constitutional right to present a defense (see, *e.g., Spencer v. Texas,* 382 U.S. 554 (1967); *McGautha v. California,* 402 U.S. 183 (1971), the failure of a court to adopt a procedure enabling defendant to make an *informed* choice on a matter of such overwhelming importance should be regarded as so fundamentally unfair as to amount to a denial of due process. When, as in the instant case, the trial court could obtain sufficient information to enable it to ascertain the admissibility of bad character evidence, a refusal to do so needlessly prejudices the accused without advancing any legitimate interest of the state. Although the court may, at times, have to undertake a lengthy voir dire examination of the accused, and may have to articulate the basis for a ruling it might otherwise avoid, this cost is far outweighed by the potential for solidifying constitutional guarantees, enhanced truth-finding, and minimizing of prejudice which the proposed procedure promotes. Furthermore, a compensating saving of court time may occur.

If after hearing the accused's proposed testimony, the trial judge excludes the Government's bad character and conduct evidence and defendant takes the stand, the ruling

gives substance to two of defendant's most basic constitutional rights: the presumption that he is innocent until proven guilty (*In re Winship,* 397 U.S. 358, 363 (1970)) ("that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' "; quoting from *Coffin v. United States,* 156 U.S. 432, 453 (1895)) and the "complex of our fundamental values and aspirations" reflected in the Fifth Amendment privilege against self-incrimination (*Kastigar v. United States,* 406 U.S. 441, 444 (1972); *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55 (1964)). Being allowed to testify without having to risk the subsequent admission of character evidence, on cross-examination or rebuttal, releases defendant from a no-win situation: if he fails to testify, the jury will infer guilt; if he testifies and the jury hears of his bad character, it will wish to punish him despite doubts about guilt.

Furthermore, the jury will have a far better basis on which to reach an accurate and just determination if it is provided an opportunity to hear defendant's version of the facts, followed by cross-examination, and is able to scrutinize defendant's demeanor. The hearsay rule and the Sixth Amendment right to confrontation testify to our legal system's recognition of in-court testimony as conducive to accurate fact-finding.

If defendant fails to testify despite a favorable ruling, an appellate saving of time will result since defendant will have forfeited any claim of error relating to character evidence. If the trial court finds the character evidence admissible and defendant does not take the stand, the reviewing court will have a more extensive record enabling it to determine more easily and accurately whether the trial court correctly exercised its discretion.

Requiring the trial court to rule on character evidence prior to defendant's taking the stand, when enough information is available to support such a ruling, would shield the defendant from the prejudice that might otherwise result if defendant chooses to testify. A question to the defendant may convey prejudice even if an objection is sustained. See, *e.g., United States v. Perry,* 512 F.2d 805 (6th Cir. 1975) (prejudice conveyed by question about defendant's connection with Mafia). Further prejudice may result if defendant is forced to object in the presence of the jury, particularly if defendant's objection pursuant to Rule 608 would consist of the invocation of his privilege against self-incrimination. *Namet v. United States,* 373 U.S. 179, 186 (1963).

For the foregoing reasons, a trial court should be required to rule on the admissibility of character evidence, which the Government has indicated it intends to offer on cross-examination or rebuttal, before defendant takes the stand, whenever the trial court has sufficient information, or would be able to acquire sufficient information, to make an accurate assessment of the admissibility of such evidence. To deprive the accused of a procedural safeguard, the absence of which renders his trial fundamentally unfair, constitutes a denial of due process.

II. The Trial Court's Refusal to Allow Cross-Examination of a Government Witness With Regard to Bias Arising Out of His Father's Status As a Federal Probationer, When the Witness' Testimony Varied From His Previous Statements in a Manner Favorable to the Government, Denied the Petitioner the Right to Confront the Witness and the Right to Effective Assistance of Counsel

The testimony of witness - the only client of the lawyer-defendant who implicated the petitioner and the

only witness not emotionally or economically connected with immunized Dr. Smith - became the lynchpin. To deny the petitioner the right to confront that witness and cross-examine him on the issue of his possible bias in favor of the prosecution was error.

The right to confront a witness before the jury on the question of his possible bias is fundamental. *Davis v. Alaska*, 343 U.S. 308 (1974); *U.S. v. Peltier*, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *U.S. v. Qualls*, 500 F.2d 1238 (8th Cir. 1974), *cert. denied*, 419 U.S. 1051 (1974); *U.S. v. Harris*, 542 F.2d 1283 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977).

In the present case the witness' testimony varied significantly from his previous statements and the petitioner's attorneys sought to elicit a motivation for his sudden change in memory, much to the benefit of the prosecution. That is a matter which is proper for presentment to the jury. *Patterson v. McCarthy*, 581 F.2d 220 (9th Cir. 1978).

The petitioner sought to examine Mr. Bossert concerning his father's status as a federal probationer. The Government objected and the Court refused to allow such examination. The status of a federal probationer is uneasy. It is not an unusual situation for the United States Parole Commission to receive "advice" and "information" from the United States Attorney's Office. It is, therefore, not uncommon for probationers or the family of a probationer to believe that it is necessary to stay within the good graces of the officials of the United States Department of Justice, or else some unpleasantness will be faced. There is no question but that this possibility arose in Mr. Bossert's mind since his attorney discussed his father's probation status with the United States Attorney when Bossert was first subpoenaed. The issue is

not whether Mr. Bossert's testimony would, in fact, affect his father's status - the issue is whether Mr. Bossert believed his testimony would do so and the petitioner was entitled to explore that status and that belief. Nor is it a function of the trial court to make a determination as to the extent of the witness' bias if the facts could indicate a bias, then it is a matter which must be left to the jury to determine the extent to which that affects the witness' credibility.

CONCLUSION

In conclusion Petitioner requests the Supreme Court issue its Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review the issues presented in this cause.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1054

United States of America,
Appellee,

v.

Ira Keith Witschner,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: May 19, 1980
Filed: July 3, 1980

Before HENLEY and McMILLIAN, Circuit Judges, and ROY, District Judge.*

HENLEY, Circuit Judge.

Appellant Ira Keith Witschner is an attorney who was indicted for mail fraud in June, 1979 together with a fellow attorney, Joseph Mounter. The nineteen-count indictment alleged use of the mails to defraud insurance companies in violation of 18 U.S.C. § 1341, and conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. Of

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*The Honorable Elsijane Trimble Roy, United States District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

the twelve counts relevant to appellant, the jury acquitted Witschner on those counts alleging the mailing of an attorney's lien letter. He was convicted on seven counts of mailing a fraudulent medical report and on the conspiracy count. On each of the seven mail fraud counts sentences of five years were imposed to run concurrently and fines aggregating $7,000.00 were assessed. On the conspiracy count the court imposed a sentence of five years and $10,000.00. This appeal followed. We affirm.

The scheme to defraud insurance companies operated over seventeen months, from June 1, 1975 to November, 1976, during which time attorneys Witschner and Mounter either prepared or caused to be prepared false medical reports signed by Dr. J. Michael Smith. The diagnoses on the reports were generally accurate, but the number of doctor visits was inflated with the result that insurance claims considerably higher than Dr. Smith's actual fees were submitted.

Testimony in support of the government's charges was received from Dr. Smith as an immunized witness, from Dr. Smith's secretary, from Dr. Smith's receptionist, and from patients who were Witschner's clients. Dr. Smith testified that in the case of each patient referred to him by Witschner, the number of office visits listed on the medical report and on Dr. Smith's office ledger card was inflated. Dr. Smith admitted receiving $200.00 for each false report made at the request of Witschner or Mounter. The secretary, Barbara Savage, linked appellant to active participation in the scheme, testifying that Witschner asked her to prepare false ledger cards so that the doctor's office records would correspond to the false insurance claims. Separate, accurate financial billing records, however, were kept in the doctor's office. This testimony was corroborated by Dr. Smith's receptionist

and by specific patients named in the indictment, who admitted seeing Dr. Smith for fewer times than the number of doctor visits reported on the insurance claims.

At trial Witschner pursued two lines of defense. While conceding that an inflated number of doctor visits had been reported on insurance claims, he attempted to show that Dr. Smith was responsible for the falsifications and that he, Witschner, had no knowledge of the inflated numbers. He also attempted to discredit the testimony of Albert Bossert, the patient who linked him most directly to active and knowing participation in the scheme.

On appeal, Witschner raises numerous allegations of error, only a few of which require extensive discussion.

I. Similar Crimes Evidence

Witschner alleges first that the district court abused its discretion in admitting evidence of similar criminal acts not charged in the indictment but done in concert with Dr. Smith. The contested evidence consisted of forty-three ledger cards pertaining to patients referred to Dr. Smith by Witschner but not named in the indictment,[1] eight ledger cards for patients referred by codefendant Mounter[2] and certain financial records of Dr. Smith. Appellant argues that this evidence is not clear and convincing evidence of wrongdoing on his part, because the Government failed to show who ordered these false records prepared. He also alleges that the evidence created a risk of undue prejudice and confusion of the jury, in violation of Fed. R. Evid. 403.

It is uncontested that other crimes evidence is admissible under Fed. R. Evid. 404(b) to show intent, plan.

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1. Government Exhibit 17.
2. Government Exhibits 17h and 17o.

knowledge and absence of mistake or accident. The additional ledger cards were expressly offered for this purpose as part of the Government's attempt to prove that Witschner and Mounter had knowledge of the inflated number of visits and that submission of the false medical reports was not an accident.

We are satisfied that the evidence was properly admitted under our recent cases, which have required, in addition to the purpose articulated in Rule 404(b), a showing that (1) a material issue on which the other crimes evidence may be admissible has been raised; (2) the proffered evidence is relevant to that issue; (3) the evidence of other crimes is clear and convincing; and (4) the evidence relates to wrongdoing similar in kind and close in time to the charge at trial. *United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), *cert. denied*, ... U.S. ....., 100 S.Ct. 281 (1979) (and cases cited therein).

Here, the material issue of appellant's knowing participation in the scheme was raised at trial, and the additional ledger cards were relevant to this issue. The evidence related to wrongdoing similar in kind and close in time to the charge at trial. As to the prerequisite that the evidence be clear and convincing, *id.*, we find that the additional false ledger cards were sufficiently linked to Witschner to constitute clear evidence of wrongdoing on his part. Barbara Savage and Dr. Smith testified that Witschner directly ordered some of the ledger card falsifications and that he had knowledge of Mounter's ordering of the remaining falsifications. Although appellant argues that Dr. Smith's testimony as an immunized witness should be discounted, this contention is merely an attack on a witness's credibility. As we have frequently reiterated, it is not our function to try the case de novo or to pass upon the credibility of witnesses or

the weight to be given their testimony. *Stanley v. Henderson*, 597 F.2d 651, 653 (8th Cir. 1979), *quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, 593 F.2d 129, 131-32 (8th Cir. 1979).

A somewhat closer question is presented by the allegation that admission of certain extra ledger cards required Witschner to address matters outside the indictment, unduly prejudicing his case at trial and confusing the jury. Although this argument has some appeal, we find on balance no error by the district court because the additional false ledger cards were highly probative. Relevant, probative evidence is properly admitted unless its probative value is substantially outweighed by the danger of undue prejudice. Fed. R. Evid. 403.

In light of appellant's line of defense at trial, the jury could conceivably have been misled into thinking that busy attorneys with hundreds of cases did not intend to defraud insurance companies on the several counts charged in the indictment. The additional ledger cards enabled the jury to obtain a picture of the defendants' conspiratorial relationship with each other and demonstrated clearly that the cards and reports in the charged mailings were not accidents or mistakes. Although the government did not prove that the additional ledger cards were prepared in connection with an insurance claim, each card carried a carbon entry showing that Mounter or Witschner made payment to Dr. Smith. It was therefore reasonable to infer that the cards were used to bolster false claims made in the same manner as those charged in the indictment.

In these circumstances, and mindful of the trial court's broad discretion over the admission of evidence, *United States v. Fuel*, 583 F.2d 978, 988 (8th Cir. 1978), *cert.*

denied, 439 U.S. 1127 (1979), we find no error in the district court's admission of the additional false ledger cards and other financial records.

II. Motion in Limine

Witschner next contends that the district court's refusal to rule on his motion in limine prior to presentation of the defense's case deprived him of his constitutional right to testify in his own behalf. Appellant's motion in limine, filed on the first day of trial, sought to exclude evidence of "Caruso claims," that is, claims in a second insurance scheme which Witschner allegedly had set up with one Dr. Caruso. At the conclusion of the government's case, Witschner sought a ruling on the motion in limine so as to ascertain before taking the stand whether the Caruso evidence could be used against him in rebuttal. The trial court declined to rule until after his testimony and until the evidence was actually offered. Witschner contends that he was prevented from taking the stand by the court's refusal to rule.

There is no merit to this contention, which attempts to elevate a matter of trial tactics to the level of a constitutional question. The district court was understandably reluctant to rule on the allowable scope of impeachment without first hearing the defendant's testimony on direct examination, especially since the admissibility of evidence regarding a similar insurance fraud might present a rather complex issue. As to the timing of a ruling on the scope of cross-examination, a trial court has discretion to issue an advance ruling, *United States v. Pfingst,* 477 F.2d 177, 193 (2d Cir.), *cert. denied,* 412 U.S. 941 (1973); *United States v. Palumbo,* 401 F.2d 270 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969) (context of prior conviction evidence), but it need not do so, *United States v. Johnston,* 543 F.2d 55, 59 (8th Cir. 1976) (context of prior convic-

tion evidence); *United States v. Pfingst, supra,* 477 F.2d at 193, even if the refusal to do so prevents a defendant from testifying in his own behalf. *United States v. Kahn,* 472 F.2d 272, 282 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973). The test on appellate review is whether the trial court abused its discretion in failing to issue an advance ruling. *United States v. Kahn, supra,* 472 F.2d at 282; *United States v. Crisona,* 416 F.2d 107, 117 (2d Cir. 1969), *cert. denied,* 397 U.S. 961 (1970) (prior convictions evidence).

Here, we find no abuse of discretion in the district court's actions and we decline to hold that the rule of discretion should be turned into one of compulsion. The trial court's power to limit cross-examination is often best exercised after hearing the direct testimony of the witness. Neither the fifth and sixth amendments nor the Federal Rules of Evidence impress upon a trial court a duty to aid the defendant in formulating his trial strategy regarding the risks of impeachment should he decide to take the stand. *United States v. Oakes,* 565 F.2d 170, 171 (1st Cir. 1977); *United States v. Kahn, supra,* 472 F.2d at 282.

III. Curtailment of Cross-Examination

Appellant's third and perhaps closest contention on appeal is that the trial court erred when it ruled that he could not cross-examine prosecution witness Albert Bossert concerning the parole status of Bossert's father. Bossert was the only client of Witschner who testified that Witschner instructed him to lie about the number of times he visited Dr. Smith.

We note at the outset that counsel for Witschner was afforded at least some opportunity to impair Bossert's credibility. In front of the jury, Bossert was asked

whether he recalled telling a postal inspector that he, Bossert, had seen Dr. Smith at least ten times, in contrast to his trial testimony that he saw Dr. Smith no more than three times. The defense then attempted to introduce a motive for Bossert's change in testimony by beginning a line of questioning which would have revealed that Bossert's father was a federal parolee. The government objected on grounds of relevance, and the court adjourned for an *in camera* hearing on the matter. Ultimately, the court ruled that impeachment of Bossert with someone else's crimes was not material and could be highly prejudicial.

We find this limitation of the defense's cross-examination troublesome, if not erroneous. It is well settled that the sixth amendment right of confrontation includes the right to cross-examine witnesses, *Davis v. Alaska,* 415 U.S. 308, 315-16 (1974); *Patterson v. McCarthy,* 581 F.2d 220 (9th Cir. 1978), and that an important function of cross-examination is to test the witness's motivation in testifying. *Davis v. Alaska, supra,* 415 U.S. at 316-17; *Greene v. McElroy,* 360 U.S. 474 (1959); *Patterson v. McCarthy, supra,* 581 F.2d at 221.

However, it is also true that the trial court had discretion to weigh the possible prejudice which might ensue from opening up collateral matters. *United States v. Qualls,* 500 F.2d 1238, 1240 (8th Cir.), *cert. denied,* 419 U.S. 1051 (1974). Here, the trial court expressed concern about the prejudicial impact of testimony regarding the parole status of Bossert's father, in circumstances where there was arguably insufficient nexus to bias on Bossert's part. Bossert testified *in camera* that he was not sure whether his father was still on parole; that he lived apart from his father; that he had not discussed the case at bar with his father; that he had never told the prosecutor

in the present case of his father's status; and that no one in the government had hinted at favors which might accrue to his father through favorable testimony.

The prosecutor advised the court that Bossert's attorney had inquired concerning Bossert's trial subpoena and had mentioned Bossert's relatives with records. However, the prosecutor stated that he had not brought any pressure to bear on the witness or intimated to him that his family might benefit if he went along with the government's case.

Bossert offered a plausible explanation for his change in testimony, indicating that he had not regarded his interview with the postal inspector as a serious matter and had not at the time of the postal inspector's interview signed a statement or been called down to discuss the matter.

In light of this *in camera* testimony, we cannot say that it was unreasonable for the trial court to refuse testimony regarding the parole status of Bossert's father. In the past we have in similar circumstances found no abuse of discretion. *United States v. Qualls, supra,* 500 F.2d 1238 (affirming refusal to allow defense to question government agents regarding possible bias resulting from job suspension and indictments against them, where trial court conducted *in camera* inquiry and where court determined that government had not entered into any bargains with the indicted agents); *see also United States v. Quinn,* 543 F.2d 640, 650-52 (8th Cir. 1976). The present case is distinguishable from cases in which the potential for bias is more strongly indicated by the witness's *own* parole or other legal status. *Cf. Patterson v. McCarthy,* 581 F.2d 220 (9th Cir. 1978) (refusal to allow cross-examination of witness regarding his parole status was

error); *United States v. Partin,* 493 F.2d 750, 757-60 (5th Cir. 1974), *later app. United States v. Partin,* 552 F.2d 621 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977); *United States v. Dickens,* 417 F.2d 958, 960-61 (8th Cir. 1969); *see generally* 3 Weinstein's Evidence ¶ 601[03] at 607-26, 607-27 (1978).

IV. Other Allegations

Appellant's other allegations of error warrant only brief mention. Witschner contends that the trial court erred in denying severance from codefendant Mounter where the evidence against Mounter was more damaging. It is not clear to us that the evidence against Mounter was in fact more damaging, but, assuming it was, appellant was not entitled to severance. *United States v. Jackson,* 549 F.2d 517, 525 (8th Cir.), *cert. denied,* 430 U.S. 985 (1977). The preference for joint trials of jointly indicted defendants, especially where conspiracy is charged, is not limited by any requirement that the quantum of evidence regarding each be equal. *Id.; United States v. Graham,* 548 F.2d 1302 (8th Cir. 1977).

Appellant also contends that the prosecutor introduced a new, surprise theory of fraud in his rebuttal argument by arguing for the first time that Witschner's fraud included the submission of doctor bills to insurance companies larger than the $200.00 paid to Dr. Smith. This contention is refuted by the record. The indictment clearly put the fraudulent nature of the $200.00 payments at issue,[3] and the defense itself addressed the flat fee arrangement in its opening statement.

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3. The indictment alleged that "WITSCHNER . . . did pay and cause to be paid Dr. James Michael Smith certain fees which were considerably less than the fees alleged in medical reports . . . submitted to insurance carriers."

Appellant's final contention[4] is that the district court erred in disallowing defense testimony on an insurance industry practice of maintaining "reserves," a practice which allows prediction of the likely amount of an uncontested insurance settlement. Witschner wished to argue that it would not be unusual for a busy attorney to ignore the contents of a medical claim which fell within the probable level of an uncontested settlement.

In determining whether proffered evidence is misleading or confusing, the trial court is given a great deal of discretion. Fed. R. Evid. 403; *United States v. Briscoe*, 574 F.2d 406, 408 (8th Cir.), *cert. denied*, 439 U.S. 858 (1978). We cannot disagree with the district court that testimony on insurance industry reserves would have been "far afield" from any issue in the case and potentially confusing to the jury and we find no error in exclusion of that evidence.

The judgment appealed from is in all things affirmed. A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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4. At oral argument, counsel abandoned appellant's challenge to allegedly erroneous statements contained in Witschner's presentence report.

JUDGMENT

(Filed August 20, 1980)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1054

September Term, 1979

United States of America,
Appellee,

vs.

Ira Keith Witschner,
Appellant.

APPEAL FROM the United States District Court for the Western District of Missouri

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the opinion of this Court.

July 3, 1980

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1054
September Term, 1979

United States of America,
Appellee,

vs.

Ira Keith Witschner,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc, and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 29, 1980